

CHAPTER 98-02-02 PREHEARING PROCEDURE

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98-02-02-01. Complaint against a specific-named respondent. [Reserved] See subsection 1 of North Dakota Century Code section 28-32-21 for statutory requirements.

98-02-02-02. Proceedings other than a complaint against a specific-named respondent. [Reserved] See subsection 3 of North Dakota Century Code section 28-32-21 for statutory requirements.

98-02-02-03. Service and filing. All pleadings, notices, written motions, requests, petitions, and briefs relating to a proceeding must be served on all parties and filed with the agency. When a proceeding has been assigned to a hearing officer outside the agency, the agency shall inform the parties of the designated hearing officer's name and address, and filing must be with the designated hearing officer at the address of the hearing officer. Unless otherwise provided by law, filing is complete upon actual receipt by the agency or the hearing officer, if one outside the agency has been designated, or upon mailing, unless the agency or hearing officer requires actual receipt by a time certain. The date of service is the day when the document is deposited in the United States mail or is delivered in person, the day of facsimile or e-mail transmission, or the date of publication if service by publication is allowed or required, except that the date of service of a document served by certified mail is the date of its delivery, or of its attempted delivery, if refused. When a party has appeared by an attorney or an authorized representative, service must be upon the attorney or the duly

authorized representative, unless service upon the party is ordered by the hearing officer. The serving party must be prepared to furnish satisfactory proof of service.

History: Effective January 1, 1992; amended effective April 1, 1998; July 1, 2012.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-21, 28-32-31, 54-57-04

98-02-02-04. Time. In computing any period of time under this title, the time begins with the day following the act or event, or default from which the designated period of time begins to run, and includes the last day of the period, unless the last day is a Saturday, Sunday, or legal holiday, in which event it includes the next following day which is not a Saturday, Sunday, or legal holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period of time after service of a document upon the party and the document is served upon the party by mail, other than certified mail, three days must be added to the prescribed period of time. Service by facsimile or e-mail transmission is not service by mail for purposes of computing any period of time under this section.

History: Effective January 1, 1992; amended effective April 1, 1998; July 1, 2012.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-21, 28-32-31, 54-57-04, 54-57-05

98-02-02-05. Appearances and representation. Any party may participate in the hearing in person, or if the party is a corporation or other artificial person, by a duly authorized representative. Regardless of whether a party is participating in person, any party may be advised and represented by an attorney licensed to practice in North Dakota or, if permitted by law, other representative. Persons acting in a representative capacity must be prepared to show proof of their authority, in law and fact, to act in such capacity.

History: Effective January 1, 1992.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-31, 54-57-04, 54-57-05

98-02-02-06. Discovery.

1. **General.** Parties may obtain discovery in accordance with the North Dakota Rules of Civil Procedure. The hearing officer shall recognize all privileged information or communications which are recognized by law.
2. **Identification of witnesses.** The hearing officer may require a party to disclose the names and addresses of all witnesses that the party intends to call at the hearing. All witnesses unknown at the time of that disclosure must be disclosed as soon as they become known. Any party failing to make disclosure required by this section without good cause may, at the discretion of the hearing officer, be foreclosed from presenting evidence at the hearing through witnesses not disclosed.

3. **Failure to comply with discovery.** The provisions of rule 37 of the North Dakota Rules of Civil Procedure regarding failure to make or cooperate in discovery, and sanctions do not apply in adjudicative proceedings except as provided in this section. Upon failure of a party to reasonably comply with a discovery request or order, the hearing officer may take one of the following actions:
 - a. Make a further order concluding that the subject matter of the order approving discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the party requesting the order;
 - b. Make an order which recognizes the failure of the party to comply and refuse to allow that party to support or oppose designated claims or defenses, or prohibit the party from introducing designated matters into evidence;
 - c. Make an order striking out pleadings, or parts thereof, or staying further proceedings until the order is obeyed;
 - d. When the hearing officer is the final decisionmaker, make an order dismissing the action or proceeding, or any part thereof, or make a default order against the party; or
 - e. When the hearing officer is not the final decisionmaker, make a recommended order dismissing the action or proceeding, or any part thereof, or make a recommended default order against the party.
4. **Protective orders.** Protective orders may be obtained from the hearing officer in accordance with the North Dakota Rules of Civil Procedure, but a hearing officer may not award expenses in regard to a motion for a protective order.

History: Effective January 1, 1992; amended effective April 1, 1998; January 1, 2008.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-33

98-02-02-07. Subpoenas.

1. Any attorney representing a party to the proceedings may issue a subpoena to require the attendance and testimony of a witness at proceedings or a subpoena for the production of documentary evidence.
2. The hearing officer shall issue a subpoena to require the attendance and testimony of a witness at proceedings or a subpoena for the production of documentary evidence only upon the written request or

motion of a party. The request or motion for a subpoena to require the attendance and testimony of a witness at proceedings must specifically identify the witness and state the complete address at which the witness may be served. The request or motion for a subpoena for the production of documentary evidence must sufficiently identify or describe the document or other object subpoenaed, must specifically identify the person who is to produce the documentary evidence, and must state the complete address at which that person may be served.

3. The party requesting a subpoena is responsible for its timely service, as well as payment of all fees, in accordance with the North Dakota Rules of Civil Procedure.
4. The provisions of rule 45(c) and (d) of the North Dakota Rules of Civil Procedure regarding protection of persons subject to subpoenas and duties in responding to subpoenas apply in adjudicative proceedings except as provided in this section.
5. A hearing officer may not impose a monetary or contempt sanction under this section.

History: Effective January 1, 1992; amended effective April 1, 1998; August 1, 2004.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-33

98-02-02-08. Motions - Certification of motions.

1. Motions must state the relief sought, the authority relied upon, and the facts alleged. If made before the hearing they must be in writing. If made at the hearing, they may be stated orally, but the hearing officer may require that they be reduced to writing, filed, and served. Within ten days after a written motion is served, or such other period as the hearing officer may fix, any party may file a response to the motion. The hearing officer may not sustain or grant a written motion prior to expiration of the time for filing responses, but may deny the motion without awaiting response. An immediate oral response may be made to an oral motion, and an oral motion may be ruled on immediately. Motions submitted to the administrative agency or hearing officer, and not disposed of in a separate ruling or in the findings of fact, conclusions of law, and order, will be deemed denied. When the hearing officer designated to preside at the hearing is not the final decisionmaker, the hearing officer is authorized to rule upon any motion not formally acted upon by the administrative agency prior to the assignment of the matter to the hearing officer.
2. The hearing officer, either upon the request of a party or independent of such a request, may certify a motion to the administrative agency for

final ruling. In deciding which motions should be certified, the hearing officer shall consider the following:

- a. Whether the motion involves a controlling question of law as to which there is a substantial ground for difference of opinion;
- b. Whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing;
- c. Whether or not the delay between the ruling and the motion would adversely affect the prevailing party;
- d. Whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or
- e. Whether it is necessary to promote the development of the full record and avoid remanding.

History: Effective January 1, 1992.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-35, 54-57-04

98-02-02-09. Prehearing conferences. The hearing officer may order the parties to participate in a prehearing conference. Any party may request the hearing officer to hold a prehearing conference, but the decision to conduct a prehearing conference is the hearing officer's. The hearing officer will determine the method and manner in which the prehearing conference will be conducted. The purpose of the prehearing conference is to identify and simplify the issues to be decided, to determine whether the pleadings need amendment or clarification, to set a hearing date, to identify witnesses and exhibits, to obtain stipulations in regard to foundation for testimony and exhibits, to identify and stipulate to material facts not in dispute, and to consider such other matters that may foster the orderly and expeditious resolution of the issues. The prehearing conference will be informal, but the hearing officer may record the proceeding. Agreements, amendments, stipulations, or other matters appropriate for resolution through the prehearing conference may be reduced to writing, entered on the record, or made the subject of an order by the hearing officer. The hearing officer may require that proposed exhibits be exchanged at the prehearing conference, or otherwise prior to the hearing. Proposed exhibits not so exchanged may be denied admission as evidence.

History: Effective January 1, 1992.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-29

98-02-02-10. Prehearing briefs. The hearing officer may require the parties to file written statements of position prior to the prehearing conference, prior to the hearing, or at the time of the hearing, summarizing their positions relative to the

issues, identifying material facts in dispute as well as those not in dispute, and identifying applicable statutes, regulations, policies, and case law.

History: Effective January 1, 1992.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-29, 28-32-35

98-02-02-11. Affidavits presented by parties. Any party intending to introduce an affidavit in evidence shall serve a copy of the affidavit upon all parties at least fifteen days prior to the hearing, unless the hearing officer fixes another time period. If, within seven days of such service, a party files and serves a written request for the opportunity to cross-examine the affiant at the hearing, the assertions may not be received in evidence unless the affiant is made available for cross-examination, or the hearing officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in the affiant's assertions, in which case the affidavit may be introduced into evidence. This procedure is not required when the parties stipulate to the admission of an affidavit.

History: Effective January 1, 1992.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-24, 28-32-35

98-02-02-12. Consolidation. The hearing officer, upon the motion of any party or upon the hearing officer's own motion, may order two or more proceedings consolidated for hearing if they present similar issues of fact and law, and if the rights of the parties or the public interest will not be substantially prejudiced.

History: Effective January 1, 1992.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-35, 54-57-04

98-02-02-13. Intervention. [Reserved] See North Dakota Century Code section 28-32-28 for statutory requirements.

98-02-02-14. Informal disposition. [Reserved] See North Dakota Century Code section 28-32-22 for statutory requirements.

98-02-02-15. Disqualification of hearing officer. This section applies only if a party has first petitioned the hearing officer for disqualification under North Dakota Century Code section 28-32-27, and the hearing officer has refused to disqualify himself or herself.

1. If the hearing officer whose disqualification is sought has been appointed or designated by the director of the office of administrative hearings, the party may petition the director, requesting appointment or designation of a different hearing officer. Upon receipt of the petition, the director, upon good cause shown, may appoint or designate a different hearing officer.

2. If the hearing officer whose disqualification is sought is the director of the office of administrative hearings, the party may petition the agency head of the agency for which the hearing officer is presiding, requesting appointment or designation of a different hearing officer. Upon receipt of the petition, the agency head, upon good cause shown, may require the director to appoint or designate a different hearing officer.
3. If the hearing officer whose disqualification is sought is an agency hearing officer, i.e., a person assigned, appointed, or designated by the agency head, the agency supervising hearing officer, or another agency official to preside, the party may petition the agency head, requesting appointment or designation of a different hearing officer. Upon receipt of the petition, the agency head, upon good cause shown, may appoint or designate a different hearing officer.

History: Effective January 1, 1994; amended effective August 1, 2004.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-27, 54-57-05

98-02-02-16. Default. [Reserved] See North Dakota Century Code section 28-32-30 for statutory requirements.

98-02-02-17. Request for auxiliary aids or services. A party requesting auxiliary aids or services that may be required for an administrative agency's hearing or related proceeding, whether for the party or a witness of the party, must make the request to the administrative agency prior to the hearing or related proceeding. The administrative agency must respond to the request and provide the aid or service if it is required to do so by federal or state law. However, the agency must be given notice sufficiently prior to the hearing or related proceeding to reasonably enable it to provide the aid or service. If the request is made to the hearing officer, the hearing officer shall inform the agency that the request has been made and refer the request to the agency. If the agency will not provide the requested aid or service, the agency must notify the requesting party and the hearing officer, in writing, that the request is denied and state the reasons for the denial, including whether the request was denied because of the timeliness of the request. If necessary, the hearing officer may reschedule the hearing or related proceeding to allow for provision of the requested aid or service by the agency.

History: Effective January 1, 1994.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-35, 28-32-36, 54-57-05

98-02-02-18. Withdrawal of attorneys.

1. Before the issuance of a notice of hearing, an attorney may withdraw an appearance for a party by filing a notice of withdrawal with the agency and, if the proceeding has been assigned to a hearing officer outside the agency, with the hearing officer. The notice must also be served

upon the party at the party's last reasonably ascertainable post-office address.

2. After the issuance of a notice of hearing, an attorney may withdraw an appearance for a party only upon leave of the presiding hearing officer. To withdraw an appearance under this subsection, an attorney must give reasonable written notice of the time and place for presentation of a motion for leave to withdraw by personally serving on the party or by mailing to the party, using any form of mail requiring a signed receipt, addressed to the party at the party's last reasonably ascertainable post-office address, a copy of the notice and motion. The attorney must also file the notice and motion with the presiding hearing officer. All motions for leave to withdraw will be decided on briefs unless oral argument is specifically requested. The hearing officer may allow or require oral argument or testimony on the motion. All briefs must be filed with the hearing officer no later than the time noticed for presentation of the motion, unless, prior to that time, the hearing officer grants an extension of time for filing briefs. If oral argument or testimony is allowed or required, the hearing officer may hear it by telephone conference at the time noticed for presentation of the motion or at another time as may be scheduled by the hearing officer.

History: Effective April 1, 1998.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-31, 28-32-35, 54-57-05

98-02-02-19. Electronic filing and service.

1. Electronic filing.

- a. Documents may be filed electronically with an agency, if permitted by the agency. If a proceeding has been assigned to a hearing officer outside of the agency and the agency permits documents to be filed electronically, documents may be filed electronically with the designated hearing officer. If a proceeding has been assigned to a hearing officer outside the agency and the agency has not stated whether it will permit electronic filing, documents may be filed electronically with the designated hearing officer, if permitted by the hearing officer or the hearing officer's agency.
- b. A document filed electronically has the same legal effect as a paper document.
- c. The typed name or facsimile signature on a document filed electronically has the same effect as an original manually affixed signature.

2. **Filing formats.** Documents filed electronically must be submitted by facsimile transmission or by e-mail. E-mailed documents must be in

portable document format (.pdf) or in an approved word processing format.

- a. Approved word processing formats for documents filed electronically are those approved by the agency or, if the proceeding has been assigned to a hearing officer outside the agency, those approved by the designated hearing officer or the designated hearing officer's agency, if the designated hearing officer or the designated hearing officer's agency has a different word processing format. Permission must be obtained in advance of submission to submit documents in other than an approved word processing format.
- b. All pages or paragraphs must be numbered in a document filed by e-mail, as required by the agency, except in cover letters or attachments to a document. Reference to material in an e-mail document must be to page number or paragraph number, as required by the agency. All lines on pages in a document filed by electronic means must be double-spaced except in cover letters or attachments to a document.

3. Time of filing.

- a. Unless otherwise stated by the agency, a document in compliance with the rules and submitted electronically to an agency by five p.m. local time will be considered filed on the date submitted. An agency may permit submission of documents to be considered filed on the date submitted if submitted by 11:59 p.m. local time. A document in compliance with the rules and submitted electronically to a party by 11:59 p.m. local time will be considered served on the date submitted. For purposes of the time of filing, local time means local time for the receiving agency or designated hearing officer.
- b. Upon filing or serving a document electronically, the filing or serving party may implement that party's own method for confirmation that the document has been received.
- c. A party filing a document electronically must pay any filing fee as required by the agency.
- d. A party filing a document electronically must pay any surcharge for internal reproduction of the document as required by the agency or, if the proceeding has been assigned to a hearing officer outside the agency, as required by the designated hearing officer's agency. No surcharge payment may be required for documents twenty total pages in length or less; for this purpose, attachments are considered part of the document. A party electronically filing a document greater than twenty total pages in length must pay a per page surcharge for each page of the document in an amount and

at such time as the agency or designated hearing officer's agency may require.

- e. If all required fees and surcharges are not paid as required by the agency or the designated hearing officer's agency, the document will be returned to the party and the party will be required to file the document again. The document will not be considered filed until proper refiling occurs.

4. Electronic service - Parties.

- a. If a party files a document by electronic means, the party may serve the document on the parties by electronic means if the recipient consents in writing to accept documents served electronically. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the intended recipient. If a party files a document by electronic means, that party has consented to service by electronic means by the hearing officer and any other party. Consent to accept documents served electronically may be given by consent for a specific proceeding or consent for all proceedings.
- b. A party may designate a facsimile number or an e-mail address as the party's own address for the purpose of accepting electronic service.
- c. If a recipient does not consent to accept electronic service of a document, service by another means specified in the rules is required.
- d. For purposes of computation of time, any document electronically served must be treated as if it were mailed on the date of transmission.
- e. If a party files a document by electronic means and the document is confidential, in whole or in part, the document must be filed with an appropriate confidentiality statement.

History: Effective July 1, 2012.

General Authority: NDCC 54-57-05

Law Implemented: NDCC 28-32-21, 28-32-31, 54-57-04, 54-57-07